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In the Supreme Court of the United States

OCTOBER TERM, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,
VERSUS
STATE OF FLORIDA, ETC., ET AL.,
Appellees,
No. 844

STATE OF FLORIDA, ETC., ET AL.,
Cross-Appellants,
VERSUS
ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
Cross-Appellees.
No. 345

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

REARGUMENT IN PURSUANCE OF ORDER OF THE COURT ENTERED FEBRUARY 4, 1935.

BRIEF ON BEHALF OF THE ATLANTIC COAST LINE RAILROAD COMPANY

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March 4, 1935.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*, VERSUS STATE OF FLORIDA, ETC., ET AL., *Appellees*,	No. 344
STATE OF FLORIDA, ETC., ET AL., *Cross-Appellants*, VERSUS ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Cross-Appellees*.	No. 345

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

REARGUMENT IN PURSUANCE OF ORDER OF THE COURT ENTERED FEBRUARY 4, 1935.

BRIEF ON BEHALF OF THE ATLANTIC COAST LINE RAILROAD COMPANY.

The points upon which the Court has indicated its desire to hear further argument are as follows:

I. Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates.

II. If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what should be the measure of an award of restitution.

III. In such an inquiry what effect, evidentiary or otherwise, should be attributed to the proceedings before and findings of the Interstate Commerce Commission.

IV. Counsel are also requested to point out what differences, if any, there are between the evidence before the District Court and that before the Interstate Commerce Commission.

THE FIRST QUESTION PROPOUNDED BY THE SUPREME COURT

I. Whether the District Court Had Jurisdiction to Award Restitution Or Should Exercise Such Jurisdiction in a Case of this Character Relating to Intrastate Rates.

A. The District Court had no jurisdiction to award restitution in this case.

This statement is made in full recognition that there is an inherent power in the United States District Courts sitting in equity to entertain motions for restitution in proper cases. This is well stated in *Arkadelphia Co. v. St. Louis, S. W.*

Rwy. Co., 249 U. S. 134, 145-146. In those circumstances in which the District Court has this jurisdiction and undertakes to exercise it, it must be exercised in consonance with the general law applicable to the particular case.

The Court can never exercise primary jurisdiction to grant restitution in those cases which involve the exercise of administrative or legislative functions.

Jurisdiction has been defined by this Court as follows:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter or qualify the plaintiff's right to the relief sought."

See

General Investment Company v. New York Central R. Co., 271 U. S. 228-230.

The fundamental question involved in this litigation was whether the Florida intrastate scale known as the Cummer scale resulted in unjust discrimination against interstate commerce, and if so, what rates should have been established to remove that discrimination.

B. Not only did the Court have no jurisdiction to award restitutions in the circumstances of this case; but if it had, it would have been neither appropriate nor proper for it to have here exercised it.

B(1) Motions had been filed with the Interstate Commerce Commission to reopen the controversy prior to March 7, 1931, when the Court entered its order making the mandates of this Court the judgments of the District Court. Before the Court entered its order referring the cause to a master to determine whether or not there should be restitution, and if so how much (which order was dated July 31, 1931, R. 1,

p. 65), the Commission had granted the motions to reopen the proceeding and hearings in the reopened proceeding had been had. The hearings in said proceeding resulted in a report by the Interstate Commerce Commission and an order thereon. That order (July 5, 1932, 186 I. C. C. 157) was sustained by this Court on April 2, 1934 (292 U. S. 1).

The Commission in its findings in the last mentioned proceeding reaffirmed its finding to the effect that the Florida state rates, referred to as the Cummer scale, were unjust, unreasonable and unjustly discriminatory against interstate commerce and made comprehensive findings to supply what this Court in 1931 found to be lacking in the 1928 report of the Commission (186 I. C. C. 157).

B(2) The Interstate Commerce Commission, and not the Court, was the sole recipient from Congress of primary power in this matter because it involved administrative determinations of complexity requiring expert knowledge and attention by those who are set apart for that purpose; and in no other way could the uniformity contemplated by the statute be preserved. Until the Interstate Commerce Commission had found that the rates which appellant had charged and collected were unjust and had awarded restitution, no court had jurisdiction over the subject matter.

B(3) The rates which were charged for the transportation service involved during the restitution period had been prescribed by the Interstate Commerce Commission after full hearing, acting in pursuance of the power granted to it by the Act of the Congress known as the Interstate Commerce Act, which Act had been so enacted in pursuance of adequate constitutional grant. Schedules and tariffs evidencing the

scale of rates so prescribed had been duly filed with the Interstate Commission as required by law and were likewise filed with the Railroad Commission of Florida. These schedules of rates remained of file in the manner aforesaid during the entire period for which restitution is sought.

B(4) Appellees are not entitled to have restitution on any account; but certainly they are not entitled to have such restitution upon the basis of rates which are unjust, unreasonable confiscatory or unjustly discriminatory.

Discussion of B(1)—The Litigation Over the Subject Matter of this Case Had Not Been Concluded at the Time Motions for Restitution Were Filed.

This point is discussed at pages 8, et seq. of appellant's brief dated January 7, 1935. The District Court should not have undertaken consideration of the motions of appellees for restitution until the cause had been finally determined; *Arizona Grocery Co. v. Atchison, etc. Ry. Co.*, 284 U. S. 370, 384; nor should it have rendered a decree allowing restitution to the appellees where the justice of the case did not call for it. See *Gould v. McFall*, 118 Penna. 455 (12 Atl. 336) and *San Francisco Ry. Co. v. Lawrence*, 30 Fed. (2) 454 (November, 1927).

The *Lawrence* case is also reported in 30 Fed. (2) 458 (March, 1928). It grew up out of the following facts:

A statute of Oklahoma required railroad companies to procure the permission of the Corporation Commission before removing any railroad shops or division points which

had been located at any place in that State for a period of not less than five years and the Corporation Commission was given jurisdiction over the subject matter. The case was brought in the District Court by the railroad against Lawrence and Taylor who were citizens of Sapulpa, Oklahoma, and against the Corporation Commission of Oklahoma and the States' Attorney General. A temporary restraining order was issued in which it was provided that the railroad was to take no action in the premises pending a hearing on the application for the temporary injunction. The Railroad Company claimed that the statute of Oklahoma was void because it violated the interstate commerce clause of the Constitution of the United States. The Corporation Commission had previously entered an order prohibiting the Railroad Company from removing its shops or division points from the City of Sapulpa. The application for restraining order before the District Court came on for hearing and the Court rendered its opinion to the effect that they were convinced that the state statute was "probably unconstitutional and that the railroad should not be compelled to maintain two shops which would prove to be a heavy burden upon interstate commerce." A temporary restraining order was granted to the railroad. The case was taken to the Supreme Court and is reported as *Lawrence v. San Francisco Ry. Co.*, 274 U. S. 588. This Court reversed the lower court but not on grounds that finally determined the case. This Court withheld determination of the question as to whether or not the Oklahoma statute forbidding railroads to move their shops and division point without permission of the Corporation Commission, was constitutional. The Corporation Commission did not supersede the first order of the

District Court which was reversed, as above stated. The railroad removed its shop and division point. After the above-mentioned reversal (which was on May 31, 1927), the Corporation Commission sought restitution of the Railroad Company and the District Court held that:

> "We think an order of restitution should not be made, if at all, until after final hearing, when the ultimate rights of the parties are established."

The Court directed the Railroad Company to proceed before the State Corporation Commission for approval of its action in removing its shop, but retained jurisdiction of the parties, saying:

> "Although plaintiff is required to proceed before the Commission, should the matter be ultimately determined in defendants' favor, restitution may be ordered," etc.

The Railroad Company, as it appears from the second report of the case in 30 Fed. (2) 458, 462, applied to the Corporation Commission for the hearing contemplated by the last mentioned order of the District Court. The Corporation Commission declined to hear complainant's application until it had restored the shop. Thereupon the cases proceeded to hearing before the District Court which held in favor of the Railroad Company and directed the bill to be dismissed. The case then again came to this Court under the style of *Lawrence et al v. St Louis-San Francisco Rwy. Co.*, 278 U. S. 228. On this appeal this Court referred to the risk which the Railroad Company took in removing its shop and said:

> "But it was clear that, upon final hearing the railway might prove that it was entitled to a permanent injunction; and the district court was not obliged to order restitution meanwhile."

This Court went further and held:

> "Although it (the lower court) required the bond, and this court held that the interlocutory injunction had been improvidently issued, the district court could, in its discretion, refuse to assess the damages until it should, after the final hearing, have determined whether the plaintiff was entitled to a permanent injunction . . . It might then refuse to allow recovery of any damages, even if the permanent injunction should be denied."

At the time restitution was ordered by the District Court in the case at bar (decree filed April 17, 1934), the Interstate Commerce Commission had finally determined that the rates which had been applied during the restitution period were just and right and that rates not less than those were necessary to prevent unjust discrimination against interstate commerce; and this finding had been upheld by the District Court and, on appeal, had been sustained by this Court (292 U. S. 1). To order restitution in such circumstances would be "not merely an idle act (compare *Goltra v. Weeks*, 271 U. S. 536, 549) but one imposing unnecessary hardship on the railway and the public" (278 U. S. 234).

The judgment of this Court setting aside the Interstate Commerce Commission's first order (August 2, 1928, 146 I. C. C. 717) was rendered on January 5, 1931 (282 U. S. 194). Before the mandates were entered in the District Court petitions had been filed with the Interstate Commerce Commission to reopen the proceeding before it (R. Vol. 1, p. 494). Quite before the District Court entered its order referring the motions for restitution to a master (July 31, 1931, R. Vol. 1, pp. 65-66) the Interstate Commission had

allowed the case to be reopened before it and set a date for the first hearing (R. Vol. 1, pp. 60-62).

The first hearing before the Interstate Commission on the reopened proceeding was held June 10-12, 1931; there was a second hearing on July 20-21, 1931, and a third hearing on February 3, 1932. Thus, the reopened proceeding was in process of hearing before the Interstate Commerce Commission prior to the entry of the first order of reference in the restitution proceeding which order, as stated was entered July 31, 1931. The Master's first report was filed November 14, 1932 (R. Vol. 1, p. 70, et seq.).

In the meantime and on July 5, 1932 (186 I. C. C. 157), the Interstate Commission had made its report and entered its order on the hearings above referred to in the first reopened proceeding before it. Bills had been filed in the United States District Court seeking to enjoin the Commission's order which was to have gone into effect on September 15, 1932. The Interstate Commission, on the 21st day of October, 1932, again reopened the proceeding before it to receive certain additional evidence (Bound vol. of Exhibits p. 157). Hearings was had thereon on November 21-22, 1932, and on January 9, 1933 (190 I. C. C. 588), the Commission made its report and entered its order on the second reopened proceeding. In this order and report it adhered to its previous findings.

Supplemental bills were filed by the claimants in the District Court and on February 24, 1933, the Court refused to enjoin the orders of the Commission (4 Fed. Supp. 477). On appeal to this Court the lower court was sustained on April 2, 1934 (292 U. S. 1).

DISCUSSION OF B(2)—THE INTERSTATE COMMERCE COMMISSION, AND NOT THE COURT, WAS THE SOLE RECIPIENT FROM CONGRESS OF PRIMARY POWER IN THIS MATTER BECAUSE IT INVOLVED ADMINISTRATIVE DETERMINATIONS OF COMPLEXITY REQUIRING EXPERT KNOWLEDGE AND ATTENTION BY THOSE WHO ARE SET APART FOR THAT PURPOSE; AND IN NO OTHER WAY COULD THE UNIFORMITY CONTEMPLATED BY THE STATUTE BE PRESERVED. NO COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THIS CASE UNTIL THE INTERSTATE COMMISSION HAD FOUND THAT THE RATES CHARGED BY APPELLANT WERE VIOLATIVE OF THE INTERSTATE COMMERCE ACT.

This Court held in *Great Northern Railway v. Merchants Elevator Co.*, 259 U. S. 285, at 291:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. *Preliminary resort to the Commission is required alike in the two classes of cases.* It is required because the inquiry is essentially one of fact and of discretion in technical matters; and *uniformity can be secured only if its determination is left to the Commission.* Moreover, that

determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts . . . But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed." (Italics added.)

The case of *Texas & Pacific Rwy. v. Abilene Cotton Oil Company*, 204 U. S. 426, at 439 held that the master purpose of the Act to Regulate Commerce was uniformity. That case was decided in 1907. The Court spoke as follows:

"That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish

schedules of reasonable rates which would have an uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479.

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statue could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

There has been no dissent from the doctrine there stated. Whenever this question has reached this Court, the opinion in the *Abilene* case has always been followed. Note the following cases:

Mitchell Coal & Coke Co. v. Pennsylvania Rd. Co., 230 U. S. 247, at 255;

Penna. Rd. Co. v. International Coal Mining Co., 230 U. S. 184, 195, 196;

Robinson v. B. & O. Rd. Co., 222 U. S. 506, 511;

Baltimore & Ohio Rd. Co. v. United States, ex rel, Pitcairn Coal Company, 215 U. S. 481, 494-5;

United States Navigation Co., Inc., v. Cunard Steamship Co., Ltd., 284 U. S. 474, 482, 483;

Board v. Great Northern Rwy. Co., 281 U. S. 412, 421-422;

Midland Valley Rd. Co. v. Barkley, 276 U. S. 482;

Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 483;

Keogh v. Chicago & N. W. Rwy. Co., 260 U. S. 156.

The subject, "The Doctrine of Primary Jurisdiction," is helpfully treated by Sharfman in his work on the Interstate Commerce Commission Part Two, p. 393.

The construction of the Act so as to require action by the Interstate Commerce Commission prior to the filing of suits on claims for overcharges and other like matters (frequently called reparations) originated out of the realization that this was necessary in order to preserve uniformity of treatment and to prevent unjust discrimination. The Court, in order to reach this construction, confined the operation of §§9 and 22 of the Act to the assertion at common law of only those causes which might be asserted consistently with the other provisions of the Act. See *Texas & Pacific Rwy. case, supra*, at pages 441, 442, 446-447.

§ 9 of the Act provides that any persons claiming to be damaged by any common carrier, subject to the provisions of the act

"may either make complaint to the Commission . . . or may bring suit in his or their own behalf for recovery of the damages for which the common carrier may be liable under the provisions of the Act."

§ 22 makes similar provisions.

The Court realized that the general terms of § 9, when taken alone, might sanction the conclusion that the shipper had a primary right to go into the courts to assert his claim for reparations growing out of interstate shipments. However it held that:

"When the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible" (204 U. S. 442).

The Circuit Court of Appeals for the Eighth Circuit in the case of *Chicago, B. & Q. R. Co. v. Merriam & Millard Co.*, 297 Fed. 1, at 5 holds that:

"Since the decision in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 441, it has been the established rule that the maintenance of a suit in a court to recover damages from a carrier because of the collection of an unreasonable rate in violation of the Act to Regulate Commerce, depends on prior action by the Commission, as a foundation for it, whereby a right to reparation has been decided."

In *Board v. Great Northern Railway Co.*, 281 U. S. 412, the Court strongly reannounces the same principle. We quote from the opinion in that case at page 422 as follows:

"The application of this principle had frequent illustration before the question arose as to unjust discriminations against interstate commerce through the fixing of

intrastate rates. In *Texas & Pacific Railway Company v. Abilene Cotton Oil Company* (204 U. S. 426), the court decided that a shipper could not maintain an action because of the exaction of an alleged unreasonable rate on interstate shipments, when the rate had been duly filed and published by the carrier and had not been found to be unreasonable by the Interstate Commerce Commission. The court found an indissoluble unity between the provision for the maintenance of rates as established in accordance with the statute and the prohibitions against preferences and discriminations, and declared that to maintain the just relation which the statute was intended to conserve it was essential that there should be uniformity of decision and that redress should be sought primarily through the administrative powers entrusted to the Interstate Commerce Commission. In *Baltimore & Ohio Railroad Company v. United States ex rel Pitcairn Coal Company* (215 U. S. 481), complaint was made by the coal company of the method of distribution of coal cars, which was said to amount to an unjust discrimination. The court considered the controversy to be controlled by the decision in the *Abilene case, supra*, and that the grievances of which complaint was made were primarily within the administrative competency of the Interstate Commerce Commission. The court said that the amendments of 1906 of the Interstate Commerce Act rendered, if possible, more imperative the construction which had been given to the act in this respect. After adverting to the case of *Interstate Commerce Commission v. Illinois Central Railroad Company* (215 U. S. 452), the court again pointed out 'the destructive effect upon the system of regulation adopted by the Act to Regulate Commerce,' if it were construed as 'giving authority to the courts, without the preliminary action of the commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body.' (215 U. S. p. 496). The question was again con-

sidered in *Robinson v. Baltimore & Ohio Railroad Company* (222 U. S. 506), where the court held that no action for reparation for discriminatory exactions for freight payments could be maintained in any Court, Federal or state, in the absence of an appropriate finding and order of the Interstate Commerce Commission. Referring to the *Abilene case, supra*, the court said, 'It is true that . . . in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material.' (Id. p. 511).

PRIOR TO DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION OF THE UNREASONABLENESS OR UNLAWFULNESS OF THE RATES WHICH WERE APPLIED, THERE WAS NO JURISDICTION IN THE COURT FOR RESTITUTION.

This principle has been frequently maintained by the decisions of this Court.

> "Without preliminary action by the Interstate Commerce Commission declaring that the carrier had, by the rule adopted in regard to distribution of cars, discriminated against a shipper in such distribution, the Federal courts have no jurisdiction of a suit by such shipper for damages alleged to be occasioned by undue discrimination against him and undue preference in favor of his competitor.
>
> "The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission."

See *Morrisdale Coal Co. v. Penna. Rd. Co.*, 230 U. S. 304. The Court cites (p. 313), *B. & O. Rd. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, and *I. C. C. v. Illinois Central*, 215 U. S. 452. At page 313 the Court further held:

> "In view of the decision in the *Abilene, Pitcairn* and *Robinson cases* it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

The *Morrisdale case* was based upon the claim that the basis of allotment was unreasonable and that all cars in the district should have been distributed according to the capacity of the mine without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. The Court held (p. 314):

> "Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time was, as we have seen, an administrative question and to be decided by the Commission as preliminary to the right to maintain this suit. *The Circuit Court rightly held that until this was done it had no jurisdiction as a Federal court of the action sought to be enforced.*" (Italics added.)

In *Pennsylvania Rd. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, there was again involved the distribution of coal cars. The Court stated:

> "Construing, therefore, §§ 8, 9 and 22 in connection with the statute as a whole, it appears that the act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did

not involve the determination of matters calling for the exercise of administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." (p. 130).

The Court at page 134 reannounces the statement made in the *Morrisdale Coal Co. case* that the reasonableness of the rule was a matter for the Commission.

In *Pennsylvania R. Co. v. Clark Bros. Coal Mining Company*, 238 U. S. 456, 469, the Court held:

> "Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

The Court cites:

Texas & Pacific Rd. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 441;

Baltimore & Ohio Rd. Co. v. United States, 215 U. S. 481;

Robinson v. Baltimore & O. Rd. Co., 222 U. S. 506;

United States v. Pac. & A. R. & Nav. Co., 228 U. S. 87, 107;

Morrisdale Coal Co. v. Penna. Rd. Co., 230 U. S. 303, 313;

Penna. Rd. Co. v. Puritan Coal Min. Co., 237 U. S. 121, 131.

"The act altered the common law by lodging in the Commission the power theretofore exercised by courts,

of determining the reasonableness of a published rate. If the finding on this question was against the carrier reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts."

Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U. S. 370, at 384.

The District Court Should Not Have Proceeded With this Case While the Same Rates Were Under Consideration by the Interstate Commerce Commission.

It is respectfully submitted that the United States District Court for the Northern District of Georgia should not have proceeded on the motions for restitution in this case after it was informed that the Interstate Commerce Commission was in the act of exercising jurisdiction over this subject matter. That is, that it was engaged in making complete the exercise of its statutory power. This thought finds substantial power in *Commonwealth of Penna. v. Williams*, decided by this Court February 4, 1935. While the subject matter of that case is very different from this case still the principles bear close analogy, for there is here as there "a statutory administration." That statutory administration in this case is of the federal government; in the *Pennsylvania case*, it was of the State. The jurisdiction of the District Court, if any it had, should have been exercised to relinquish its jurisdiction in favor of the statutory administration, to-wit: the Interstate Commerce Commission.

The Limitations Which Apply to Claims for Restitution Based Upon Transactions in Interstate Commerce Apply to Those Arising in the Circumstances of this Case.

We are mindful of the fact that the decisions which have been quoted above grow out of transactions which arose in interstate commerce. The claims which are asserted in the case at bar grow out of findings by the Interstate Commerce Commission of reasonable rates for interstate commerce of the carriage of logs between designated points in Florida and Georgia; and also its findings that the intrastate rates complained of were unreasonable and were unjustly discriminatory against interstate commerce. An order was entered by the Commission on said findings. Petitions were brought by appellees to enjoin said order in the District Court of the United States for the Northern District of Georgia. The Court declined to issue an injunction. Said order of the District Court was reversed by this Court on procedural grounds. (282 U. S. 194.) After the first order of the Interstate Commission entered August 2, 1928 (146 I. C. C. 717) and which went into effect on February 8, 1929, schedules were filed with the Interstate Commission and the Florida Commission which carried the rates so prescribed by the Interstate Commission in its said first order (R. Vol. 1, p. 500). The rates, evidenced by the above mentioned filed schedules, were charged from February 8, 1929, to April 10, 1931. While those schedules were thus filed they had the force of law and under the provisions of Section 13(4) of the Interstate Commerce Act were to be observed by the "carriers parties to such proceeding affected thereby, the law of any State or the decision

or order of any State authority to the contrary notwithstanding." In this connection see *Louisville & Nashville Rd. Co. v. Central Iron Co.*, 265 U. S. 59, 65, from which we quote as follows:

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges *legally* payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefore." (Italics added.)

The Court cites:

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U. S. 577;

New York Central, etc., R. R. Co. v. York & Whitney Co., 256 U. S. 406;

Compare

St. Louis S. W. Ry. Co. v. Spring River Stone Co., 236 U. S. 718.

See also

Penna. Rd. v. International Coal Mining Co., 230 U. S. 184, 197;

Poor v. C. B. & Q. Rd. Co., 12 I. C. C. 418;

Poor v. C. B. & Q. Rd. Co., 12 I. C. C. 469;

Illinois Central Rd. Co. v. Henderson, 226 U. S. 441; and

Kansas City Southern Rwy. v. Carl, 227 U. S. 639.

Under the case of *Arizona Grocery Co. v. Atchison, Topeka & Kansas City R. R. Co.*, 284 U. S. 370, 384, the rates fixed by the Interstate Commission would appear to have been the "lawful," as well as the legal ones, while the schedules were of file.

The text of § 13(4) of the Act does not justify the thought that a tariff of intrastate rates ordered into effect by the Interstate Commerce Commission should not be followed during a period of litigation over the order which directed the rates to be put into effect although that order be subsequently overturned by the Court. We do not understand that appellees make any dispute as to this.

> "The duly filed and published tariff rate, while in force, is the only lawful rate."

See *Chicago, B. & Q. Rd. Co. v. Merriam & Millard Co.*, 297 Fed. 1.

In *Florida v. United States*, 292 U. S. 1 (which is the case at bar in a previous hearing) the Court held:

> "The authority conferred upon the Commission by § 13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instrument of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body."

THE PROVISIONS OF § 13(4) OF THE ACT—WHICH CAME INTO IT BY AMENDMENT—ARE TO BE CONSTRUED AS A PART OF THE WHOLE ACT TO REGULATE COMMERCE.

§ 13(4) came into the Act by amendment through the Transportation Act of 1920. It came as a part of an existing structure and is to have the same kind of construction as though it had been in the original Act. See *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396, as follows:

> "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

Also *United States v. Barnes*, 222 U. S. 513, 520, from which we quote as follows:

> "Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as to the contrary clearly appears."

The same kind of conclusion is reached in *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 384, from which we quote as follows:

> "As a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed."

Again the principle was stated where its application seems to be much further off than in the case at bar, in *United States v. Sweet*, 245 U. S. 563, 572, as follows:

> "What has been said demonstrates that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will."

Section 13(4) of the Act can not be given effective strength without treating it as a part of the original Act.

The case of *Board v. Great Northern Railway*, 281 U. S. 412, with its accompanying notes makes it very clear that subsections 3 and 4 of section 13 of the Act were enacted to round out the major purpose of the Act against unjust discrimination.

Statutory Power of the Commission Over Complaints.

By § 13(1) of the Act any person is authorized to complain to the Commission against any common carrier subject to the Act because of a violation by the carrier of any provision of the Act. If the carrier does not satisfy the complaint within the time allowed it is made the duty of the Commission to in-

vestigate the matter complained of in such manner and by such means as it shall deem proper.

That provision has been in the Act substantially as now from its original enactment. That is also true of subsection 2 of Section 13. Subsections 3 and 4 of Section 13 were added in 1920—thirteen years after the *Abilene Cotton Oil case.*

Section 16 of the Act provides in substance that if, after hearing on a complaint made under Section 13 of the Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled, or before a day named.

That provision was also in the Act long before the adoption of the Transportation Act of 1920. Subsections 3 and 4 of Section 13 came into the Act by amendment to original Section 13 for the purpose of giving the Commission greater power to enforce the provisions of the Act against unjust discrimination against interstate commerce. The power to enforce the new provisions of § 13 continued to be the same as had been used to enforce the provisions of that section prior to the enactment of the amendment which added subsections 3 and 4 to Section 13.

Section 16 of the Act directs the Commission

> "to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

If the carrier did not comply with that order then the person complaining might file suit in the District Court of the United

States. Under this plan no suit could be brought until complaint had been made, investigation had by the Commission and the Commission had ordered the payment and the carrier had refused to comply with the order.

The complaint filed with the Commission in this case against appellant was based upon the allegation that it had made intra-

> Under section 15 of the Act, the Commission, after full hearing of the complaint as provided in section 13, or after full hearing under an order for investigation on its own initiative, is empowered to determine and prescribe "what would be the just and reasonable individual or joint rate . . . to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged." The Commission exercised this power in this case.

significant definition of the legislative structure under which the Interstate Commerce Commission is now functioning." He treats its contribution as being "the statutory recognition of a positive public responsibility, in the exercise of the Commission's regulating functions, toward the establishment and maintenance of an adequate transportation service." He states that it is generally characterized as a "radically constructive measure."

It is described by Edgar J. Rich in *American Economic Review*, Vol. 10, page 507, as being

> "the first constructive railroad legislation enacted by Congress since the land grant acts passed in 1863 and 1866."

This Court in *Wisconsin Rd. Com. v. C. B. & Q. Rd. Co.*, 257 U. S. 563, at 585 described it as making "a new departure." In *New England Divisions Case*, 261 U. S. 184, at 189, this Court stated that the

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy."

It also said:

> "Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language."

In *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, at 478, this Court states that this Act "adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country."

At page 485 the Court states:

> "In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established."

This Act gives to the Commission the power to prescribe

States. Under this plan no suit could be brought until complaint had been made, investigation had by the Commission and the Commission had ordered the payment and the carrier had refused to comply with the order.

The complaint filed with the Commission in this case against appellant was based upon the allegation that it had made intrastate rates for the transportation of logs which violated the Interstate Commerce Act in that those rates unjustly discriminated against interstate commerce. This is, of course, made unlawful by Sections 3 and 13(4) of the Act.

The Transportation Act of 1920.

The Transportation Act of 1920 is described in Sharfman's "The Interstate Commerce Commission," Chapter V, Part One, page 177-244. That writer states that it constitutes "the most significant definition of the legislative structure under which the Interstate Commerce Commission is now functioning." He treats its contribution as being "the statutory recognition of a positive public responsibility, in the exercise of the Commission's regulating functions, toward the establishment and maintenance of an adequate transportation service." He states that it is generally characterized as a "radically constructive measure."

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minimum as well as maximum rates or minimum and maximum rates; that is, the actual rate.

There are many other provisions of the Act such as the Commission's jurisdiction over the combination of carriers; over their traffic agreements; over their issuance of securities; and the service rendered by them.

Probably the two most important accomplishments of Transportation Act of 1920 were that it gave express legal sanction to the development of cooperation between the federal tribunal (the Interstate Commission) and the state bodies, and gave to the Interstate Commission the express statutory power to remove discrimination worked by intrastate commerce against interstate commerce. When one considers that Section 13(3) and 13(4) are the expression of this important power it must be recognized that § 13(4) came into the Act to Regulate Commerce to fit in with the other provisions of the Act and especially to that part of the Act to which it was attached; that is, Section 13. It was not intended to give to this amended Act only a part of the power which by years of construction had grown up around the related parts of the Act and specifically around those parts aimed at discrimination. The Act prior to amendment had for many years been construed to mean that an action for overcharges, or for reparations or for damages, growing out of a breach of any provision of the Interstate Commerce Act could not be maintained until after the subject had been submitted to and passed upon by the Interstate Commerce Commission. *Arizona Grocery Co. case*, 284 U. S. 370, 384. It would seem to be certain that the new provisions of Section 13 (3) and (4) became a part of the original Act with the construction which had been given thereto.

Argument of Appellees as to Why Resort to the Interstate Commerce Commission is Unnecessary in a Proceeding Involving a Rate Made Under Section 13(3) (4) of the Act.

On page 2 of the "Reply Brief of Appellees and Cross-Appellants to Additional Brief of Atlantic Coast Line Railroad Company," the appellees state that the Interstate Commerce Commission is limited under Section 13(4) of the Act to prescribing "the rate *thereafter* to be charged."

Appellees thus confuse the power of the Commission to prescribe a rate, rule or practice for the future, which is a legislative function, and the power to determine whether a shipper in the past has been wronged by the exaction of an unreasonable or discriminatory rate, which is a judicial function. *Great Northern Rwy. Co. v. Merchants Elevator Co.*, 259 U. S. 291.

These powers are quite different; but preliminary resort to the Commission is required alike in the two classes of cases.

> "Awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different."
>
> *Baer Bros. v. Denver & R. G. R. R. Co.*, 233 U. S. 479 at 486;
>
> *Great Northern Railway v. Merchants Elevator Co., supra.*

When Section 13(4) of the Act states that the Commission shall prescribe "the rate . . . thereafter to be charged," etc., it is dealing with rates which are to have prospective operation

to take the place of rates which the Commission has found to cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. The rates to be fixed by the Commission "to be thereafter charged" are to be such as will remove such advantage, preference, prejudice, or discrimination as to future transportation. This power does not deal with the matter of reparations or damages in a case of the kind at bar. Those things are dealt with in the Act itself into which subsections (3) and (4) of Section 13 were brought and which parts of the Act make provision for reparations or damages.

DISCUSSION OF B(3).

The rates which were charged by appellant during the time called the restitution period (February 8, 1929 - April 10, 1931) had been prescribed by the Interstate Commerce Commission after full hearing, and tariffs evidencing the same had been filed with the Interstate Commerce Commission and with the Florida Commission as required by law. Those rates then became the lawful rates and the Commission

> "was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself." *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. at 389.

Discussion of B(4)—Appellees are not Entitled to Have Restitution on Any Account; But Certainly They are not Entitled to Have Such Restitution Upon the Basis of Rates Which are Unjust, Unreasonable or Unjustly Discriminatory.

The trial of this case in the Court below, after it had overruled the contention of appellant to the effect that the Interstate Commerce Commission was the primary source of power, then proceeded upon the theory that the State laws of Florida applied. This is discussed in appellant's brief of January 7, 1935, pp. 77, et seq. This resulted in findings both by the Master and by the Court that the Cummer scale of rates was unjust, unreasonable and confiscatory. Certainly the Court had no right to grant restitution upon a basis which was confiscatory. The Court then undertook to fix a rate different from that which had been fixed by the Interstate Commission prior thereto (186 I. C. C. 157). In this proceeding all the claimants before the Commission were parties.

The Master came to a conclusion different from that reached by the Interstate Commerce Commission notwithstanding that he stated in his second report (R. Vol. 1, p. 200):

> "The oral and documentary evidence in the record before the Interstate Commerce Commission, in many instances, is substantially the same as the evidence introduced in the hearings before the Master and in this report the Master will frequently refer to statements in the reports of the Commission, where such evidence is succinctly stated and readily accessible, instead of making reference to the evidence introduced at hearings before him."

The Court overruled exceptions to this and entered a decree confirming the report.

We respectfully submit that this proceeding shows the profound error of the Court and the Interstate Commerce Commission acting upon the same subject matter at the same time. If this be not contrary to specific law, as it is under the authorities cited herein, then the Court should certainly have exercised its discretion to withhold action until the Interstate Commerce Commission had acted. *Commonwealth of Penna. v. Williams, supra.*

THE SECOND QUESTION PROPOUNDED BY THE SUPREME COURT

II. If the District Court Had Such Jurisdiction and Should Exercise It in a Case of this Character Relating to the Revenue Needs of the Carrier, What Should Be the Measure of an Award of Restitution.

Under the statutes and decisions which have been discussed, it appears to us quite impossible that the District Court should have legally exercised jurisdiction to render a judgment against appellant for restitution or reparation or overcharges in this case.

It is appropriate to examine appellees' motions for restitution. The motion by Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company is to be found at R. Vol. 1, p. 7. Movants at page 8 moved the District Court to render decree against the Atlantic Coast Line

Railroad Company "to restore to the respective complainants the amount paid by such complainants to said intervenor and defendant because of the erroneous decrees heretofore entered by this Court herein." It is claimed (p. 9) that the rates which complainants had paid (that is, the rates fixed by the Interstate Commerce Commission on August 2, 1928, 146 I. C. C. 717) to Atlantic Coast Line "were in excess of the lawful state rates for such transportation of such logs assailed in said proceedings before said Interstate Commerce Commission." The rates referred to as "the lawful State rates" were those under the Cummer scale. They further allege:

> "And so it is that said complainants have been subjected to and compelled by said decrees of this court to pay *overcharges* in the amount of large sums of money charged, demanded, collected and received by said intervenor and defendant as aforesaid, and the complainants aver that they are now entitled to restitution of said *overcharges* together with interest thereon at the legal rate in Florida from the respective dates of the payment of said *overcharges*." (Italics added.)

Complainants moved the Court "for an order of reference to a Master for the ascertainment of the amount of restitution properly to be made by said Atlantic Coast Line Railroad to the several complainants." (p. 10.)

The Wilson Lumber Company's motion is to be found at record pages 11, et seq., and is in practically the same language. The motion of the State of Florida by its Attorney-General and its Railroad Commissioners and the special counsel for the Commission is found at pages 15 et seq., and in so far as it is referred to here, is in substantially the same language as are the other motions.

It will be seen that each claim is for overcharges as measured on the one hand by the rates charged (that is, the rates fixed by the Interstate Commerce Commission) and on the other hand by the "lawful State rates for such transportation." The maximum that could be allowed under these claims was the difference between what would have been charged under the Cummer scale of rates and what was charged under the scale fixed by the Interstate Commerce Commission. In order, however, to sustain those claims the Cummer scale of rates must have been the lawful scale in Florida at all the times involved.

The Cummer scale of rates was not the lawful scale. This we have argued at some length beginning at page 84 of appellant's brief dated January 7, 1935. This was established in the Court below (R. Vol. 1, pp. 86, 164, 219-220).

Under the plan on which appellees have based their claims there should be no recovery for they have not sustained that plan. When the Cummer scale of rates was adjudged to be not the lawful scale of rates there was a duty on the part of the appellees, if they continued to claim under the State law, to establish what were the lawful rates. They did not do that although the case was re-referred to the Master on the condition which has been discussed in our original brief (dated January 7, 1935) and which condition was not complied with by the appellees. They did not undertake to prove any rates which should have been charged other than the Cummer scale of rates.

If the Court ever had jurisdiction of this case, which we deny, that jurisdiction failed when it was established that

there were no lawful state rates covering this subject. The Court could not make a rate.

In any event, if the Court had jurisdiction, we submit that the rate which should have been used by the Court as the yardstick by which to determine appellant's liability, if any, should have been one which embraced each of the elements which the law required in an intrastate rate for future application.

It would be manifestly unfair to require appellant to respond in damages to a shipper on a rate made upon bases different from those which it was required by law to apply to the going rate. This would seem to be axiomatic.

In the order re-referring this cause to the Master of January 30, 1933 (R. Vol. 1, p. 172) the Court recommitted.

> "this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly."

It was claimed by appellees that the Court "should not have given consideration to (a) the State statutes or (b) the Federal statutes, which relate to the making of rates to be established for future application"; and it was likewise claimed that:

> "In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should not have given consideration to discrimination of any sort, either as between persons or localities or as against interstate commerce, under (a) the Florida statutes, or (b) the Federal statutes."

(See points 8 and 9 of appellees' brief, pp. 23 and 105.)

The Master in his second report (R. Vol. 1, pages 193-194) states that in determining what charges the defendant might have made and collected

> "the Master should be governed by what charges would have been proper under all the facts and circumstances, and according to the law and rules governing the fixing of rates and charges at the time they were made and collected."

He recognized that unjust discrimination in charges for the transportation of persons and property by common carriers is condemned by Article XVI, section 30 of the Florida Constitution and says:

> "In deciding what charges should have been made during a past period they should not be charges that would have caused unjust discrimination." (R. p. 194.)

He does not refer there to discrimination against interstate commerce for on page 195 he states that:

> "The Act of Congress authorizing the I. C. C. to establish such intrastate rates as will not be an unjust discrimination against persons and localities or against interstate commerce, and as will bear an amount of revenue that will contribute a proportionate share towards maintaining an adequate national railway system, does not in and of itself provide that the rates established by State Commission shall under any state of facts be unlawful, until they have been considered after a full hearing by the Interstate Commerce Commission and a finding made by it that they cause unjust discrimination against Interstate Commerce or otherwise violate the Act."

This statement is made notwithstanding the provisions of Sections 3 and 13(4) of the Act to Regulate Commerce. These

sections are copied at page 111 of appellant's brief dated January 7, 1935, and the proposition is argued at pages 109, et seq. It is very plain from the reading of the Master's statements in reference to discrimination that he did not consider as binding upon the Court the provisions of the Interstate Commerce Act prohibiting discrimination. Nor did the District Court (note opinion on exceptions to Master's report, R. Vol. 1, pp. 350, et seq.). Both the Master and the Court appear to have regarded the provisions of the Act to Regulate Commerce against discrimination as something to be "regarded" but not as something binding upon them.

The opinion of the District Court regards the prohibitions against discrimination contained in the Florida law more binding than the provisions of the Federal Act, for it states (R. Vol. 1, p. 351), page 4 of appendix No. 1 to brief of January 7, 1935:

> "Since, for instance, the Florida law prohibits discrimination by common carriers, discrimination ought to be avoided not only in fixing future rates but as far as practicable in measuring compensation for past services. The prohibition of federal law aimed at discrimination by states rates against interstate commerce is not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem."

We follow this opinion to record page 353 where the Court states:

> "Discrimination as respects the revenues of the carrier, while a most important question in fixing permanent

future rates, can hardly be investigated or considered in a private litigation between carrier and shipper regarding a past shipment." (Page 7 of said appendix.)

The Court on this page of its opinion calls attention to the fact that the Master's findings are not specific and that he does not show how he arrived at the precise scale of reasonable charges which he fixed. At the same record page under the heading "Findings of Fact" the Court shows that it had considerable doubt as to whether the compensation fixed by the Master for the transportation service involved should not have been more liberal.

We respectfully submit that both the Master's report and the Court's opinion and findings show that no such consideration was given to the question of discrimination as to satisfy the requirement of the statutes; nor was it sufficient to comply with the principles of equity.

Both the Master's report and the findings of the Court thereon show that they both acted upon principles which are in complete conflict with the decisions of this Court which have been hereinbefore referred to and which deny jurisdiction to the courts, to fix rates, and put that jurisdiction primarily in the Interstate Commerce Commission. They are also in complete conflict with the repeated decisions of this Court to the effect that the Commission's findings on these subjects, based upon proper evidence, are conclusive.

At any rate, the Master's report and the District Court's findings simply brush aside the fact that the rates which were applied by the carrier were rates evidenced by properly filed schedules or tariffs and that the carrier was obliged to charge those rates or be subjected to criminal penalties.

The Master and the Court adopted standards for the measure of the award of restitution which are in conflict with the decisions of this Court to which reference has been made and which violate all the provisions which have been built up around the Act to Regulate Commerce to provide uniformity of treatment and to prevent discrimination.

In No Event Were Appellees Entitled to Restitution on Rates Different from Those Fixed by the Interstate Commerce Commission in the Reopened Proceedings; Nor on a Basis Different From the Findings of Fact by the Interstate Commerce Commission in Said Proceedings.

The basis of the proceeding in this case before the Interstate Commerce Commission was the ascertainment of the fact as to whether or not the rates which were being charged for intrastate transportation of logs over appellant's line in Florida (the Cummer scale) resulted in unjust discrimination against interstate commerce. The Interstate Commerce Commission, as we have pointed out, in its first report (146 I. C. C. 717) at 724 found that the Florida intrastate rates (Cummer scale) "are less than reasonably compensatory." It also found that those rates

> "result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia; and in unjust discrimination against interstate commerce."

In its second report (186 I. C. C. 157), at 165 the Commission again found:

> "The above evidence warrants the conclusion that the Cummer scale rates are abnormally low. Upon similar evidence submitted at the original hearing division 4 found that they are 'less than reasonably compensatory.' We affirm that finding."

The Interstate Commerce Commission then ordered into effect the rates which were charged by appellant during the restitution period. The Commission found the Cummer scale of rates caused unjust discrimination against interstate commerce from a revenue standpoint; and the rates which it ordered into effect were those determined by it to be necessary to remove that discrimination. They were ordered into effect as "minimum rates" (186 I. C. C. 198).

Of course, the rates which should have been used as the standard or yardstick for determining the amount, if any, of restitution, should have been sufficient to remove unjust discrimination against interstate commerce. It would seem perfectly clear that there could be no other basis for an award of restitution. The District Court and the Interstate Commission differed in a field in which the Commission is the controlling power.

We respectfully submit that the schedule of rates twice fixed by the Interstate Commerce Commission as hereinbefore referred to, should have been the measure of the award in this case. The rates so fixed by the Commission and charged by the carrier during the restitution period are the same, and therefore, no restitution should have been awarded.

This is not intended to detract from the argument which we have made as to the lack of jurisdiction in the District Court. We believe that is controlling of the case.

THE THIRD QUESTION PROPOUNDED BY THE SUPREME COURT

III. In Such an Inquiry What Effect, Evidentiary of Otherwise, Should Be Attributed to the Proceedings Before and Findings of the Interstate Commerce Commission.

The power of Congress over interstate commerce is derived, of course, from the interstate commerce clause of the Constitution. The power of Congress to deal with intrastate commerce is based upon the necessity of regulating those internal concerns which affect the states generally. The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove unjust discrimination against interstate commerce has been specifically determined in this particular case. *Florida v. United States*, 282 U. S. 194, 210.

The Congress has fully empowered the Interstate Commerce Commission to grant relief against intrastate rates which unduly interfere with the regulation of interstate commerce.

The power to regulate interstate commerce

> "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat. 1, star page 197.

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden*, 9 Wheat. 195.

This power may be exercised wherever the subject exists. The reservation to the state of power over its completely internal commerce must be construed to be

"only of that authority which is consistent with and not opposed to the grant to Congress."

Minnesota Rate Cases, 230 U. S. 352, 399.

The supremacy of federal power over this subject is a necessary conclusion from the fact that the Constitution of the United States and the laws which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land. *Gibbons v. Ogden*, 9 Wheat. 211.

The regulation of intrastate commerce under the system of government as it now stands remains with the state until Congress acts, and when Congress acts, its regulations of the subject are supreme. And when a state

"in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function." *Minnesota Rate cases*, 230 U. S. 352, 411.

In *Houston & Texas Ry. v. United States* (Shreveport case), 234 U. S. 342, at 350 the Court stated that:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the *complete* and *paramount* character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the *varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.*" (Italics added.)

The Court in that case also held at pages 351-352:

> "As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled *to prescribe the final and dominant rule*, for

otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." (Italics added.)

At page 353 of this opinion the Court recognized that Congress

> "does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."

At page 354 the Court also held that the power

> "to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority."

There are many other authorities to the same effect.

In the case at bar we find that the Interstate Commerce Commission was appealed to to require the removal of discrimination against interstate commerce which was being worked by the Florida intrastate rates on logs hauled by appellant in that State; after full hearing the Commission undertook to exercise that power and made findings and an order thereon; this Court did not deem those findings to be sufficient to sustain the Commission's ultimate conclusion that the Florida intrastate rates (Cummer scale) were unjustly discriminatory against interstate commerce. The Court set aside the order of the Commission but recognized the right in the Commission to continue to exercise jurisdiction over the subject. The Commission was then asked to reopen the proceeding and on

April 6, 1931, did reopen it. The motions to reopen were filed with the Commission prior to the entry in the District Court of the mandates of this Court reversing the opinion of the District Court which had sustained the action of the Interstate Commerce Commission. In the meantime, schedules had been filed as prescribed by law stating the rates which had been ordered into effect by the Interstate Commerce Commission and those tariffs remained of file during all the time involved in what is called the restitution period.

It is our contention that the power delegated by the Constitution to Congress over interstate commerce and the Act to Regulate Commerce, with its several amendments which have been hereinbefore referred to, especially the amendments of 1906, 1910 and the Transportation Act of 1920, had the effect of giving to the Commission full, complete and dominant power to prevent unjust discrimination against interstate commerce by intrastate rates. The Congress had brought into being a system or code of laws which was the development of years of Congressional enactment and as well as judicial construction. The Act referred to became part of that Code.

Appellees in this case filed their claims in the United States District Court for the Northern District of Georgia without having applied to the legislative or administrative departments of the Government which have been created and set apart for this purpose. They did this notwithstanding that, as we have seen, the Act to Regulate Commerce altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate and that the shipper had the right to reparation only when that question had been determined by the Com-

mission against the carrier. *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384, and other cases cited.

The appellees had appealed to federal jurisdiction for redress of a wrong which they claimed was done against them through the act of an agency of the federal government. When they appealed to federal jurisdiction for redress they were then obliged to pursue the methods required by that jurisdiction, and they could seek that redress only in the manner prescribed thereby. In such circumstances it has been distinctly held that

> "redress should be sought primarily through the administrative powers entrusted to the Interstate Commerce Commission." *Board v. Great Northern Rwy. Co.*, 281 U. S. 412, at 422.

This Court in that quotation was following *Texas & Pacific Rwy. v. Abilene Cotton Oil Co.*, 204 U. S. 426, and states:

> "The court found an indissoluble unity between the provision for the maintenance of rates as established in accordance with the statute and the prohibitions against preferences and discriminations, and declared that to maintain the just relation which the statute was intended to conserve it was essential that there should be uniformity of decision and that redress should be sought primarily through the administrative powers entrusted to the Interstate Commerce Commission."

The power of Congress in reference to interstate commerce

> "is complete in itself, may be exercised to its *utmost extent*, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat 1, star page 197.

"Redress" of that which is alleged to have been a wrong done by the Interstate Commerce Commission is to be accomplished by primary resort to the Interstate Commerce Commission.

Board v. Great Northern Rwy., 281 U. S. 412.

The court in this case dealt with a long standing controversy between the Board of Railroad Commissioners of North Dakota and the Great Northern Railway. Much of that controversy dealing with the first stages need not be repeated in detail here. Suffice it to say that this court found that:

> "The state commission was thus left free to exercise its lawful authority over intrastate rates."

That was as of the date of July 22, 1922.

After further proceedings on the general subject of the rates there involved the State Board of Railroad Commissioners issued an order of May 8, 1929, reducing the then existing intrastate class rates. The railroad then filed a petition with the Interstate Commerce Commission alleging that the scale of class rates required by the State Commission in said order would unjustly discriminate against persons and localities in interstate commerce, and would constitute an unreasonable burden on interstate commerce, in violation of Section 13 of the Interstate Commerce Act, and asked the Interstate Commission to institute a proceeding to determine whether such unjust discrimination would result and to prohibit it by prescribing the class rates to be charged by the carriers for intrastate transportation in North Dakota.

Thereupon the suit now known as *Board v. Great Northern Railway* was brought. The interlocutory injunction, granted below, restrained the state commission and other state officials

from putting into effect the intrastate class rates prescribed by the order of May 8, 1929, until the Interstate Commerce Commission, either in its docket No. 17,000, or in the proceeding under section 13 of the Interstate Commerce Act which the carriers had petitioned the Interstate Commerce Commission to institute, determined the question of unjust discrimination with respect to interstate commerce, and until the further order of the court. Appeal was taken from this interlocutory order. The interlocutory injunction was in aid of the proceedings pending before the Interstate Commerce Commission.

This court held that, under that statements of facts, the District Court had no right to grant an injunction against intrastate rates on the ground that they were unjustly discriminatory against interstate commerce or against persons and places in interstate commerce. There was no allegation that the state rates were unreasonable, unjust or confiscatory.

The case at bar was filed May 3, 1926, and the proceedings have been hereinbefore fully set out, including the report of the Commission, the adjudications by the District Court, the filing of the tariffs evidencing the rates fixed by the Commission and the determination by this court.

None of those qualities was in the North Dakota case.

Furthermore, it has been judicially determined in the case at bar by the Interstate Commission in its first findings and by the District Court in its orders thereon and by the Interstate Commission in its second report and order; and by the Master and the District Court dealing with the reparations proceeding that the intrastate rates (the Cummer scale) here involved, were unjust, unreasonable, and confiscatory. *During*

the period involved in this case Florida had no lawful rates in effect. In other words, the Cummer scale was unjust, unreasonable and beyond the power of the State Commission because contrary to its statutes; and the rates under the Cummer scale were void and confiscatory because of the provisions of the Fourteenth Amendment to the Constitution of the United States and the corresponding provisions of the Constitution of Florida.

In the North Dakota case there had been no finding that the intrastate class rates were unlawful or otherwise nonexistent.

In these circumstances and after this court had set aside the first order of the Interstate Commerce Commission, appellees sought restitution on the basis of overcharges based upon the avowed claim that the Cummer scale of rates was the lawful scale of rates in Florida. They failed to establish that the Cummer scale of rates was the lawful scale of rates in Florida at any time involved in the restitution period; on the other hand, those rates were determined to be void. There was no such determination in the North Dakota case.

After it was shown that the State of Florida had no lawful established rate during the period involved, appellees' case failed, (if any they had ever stated). They then undertook to have the District Court build a rate. They were thus running counter to all of the decisions of this Court on the subject to which we have referred. The Court undertook to say, in effect, on the reference that "we will determine that the rates for the transportation service under consideration ought to have been during the period involved"; and because it was for past transactions rather than for future ones, the appellees say, in effect, that resort to the primary jurisdiction of the Com-

mission was not necessary. They overlook the fact that they were in a federal jurisdiction and were appealing to the exercise of the jurisdiction of a federal court. They then come in exact conflict with the case of *Great Northern Railway Co. v. Merchants Elevator Company*, 259 U. S. 285, at 291 where this court held:

> "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters and uniformity can be secured only if its determination is left to the Commission."

Thus, they also then turned the *Baltimore and Ohio v. United States* case (279 U. S. 781) into a strong authority against them.

The answer to the third question might very well end here for there was no primary resort to the Interstate Commission.

Evidentiary Value of Commission's Findings of Fact.

When the case was reopened before the Commission, hearings were had and a great deal of evidence was taken. All the parties who are appellees here, appeared and contested the same. In that proceeding the Commission not only made findings, as we have pointed out, reaffirming its previous findings in the first report, but made new findings which fully established the correctness, legality and fairness of the original findings; and made rates to be thereafter charged. Those rates

were the same as the rates fixed by its original order. The Commission's findings of fact to the effect that the Cummer scale of rates was unjust, unreasonable and that it unjustly discriminated against interstate commerce; and that that discrimination should be removed by the application of the schedule of rates then prescribed as the minimum rates to be used, should be treated as conclusive upon the appellees. This Court has in *Florida v. United States*, 292 U. S. 1 (involving the same rates) made a sweeping pronouncement of the law as to the effect of findings of fact made by the Commission when supported by evidence. We quote from page 12 of that opinion, as follows:

> "The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by § 13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.* (257 U. S. 563). The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the pro-

hibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 100; *Western Chemical Co. v. United States*, 271 U. S. 268, 271; *Virginian Railway Co. v. United States*, 272 U. S. 658, 663; *Assigned Car Cases*, 274 U. S. 564, 580; *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 508; *Crowell v. Benson*, 285 U. S. 22, 50, 51.

"We agree with the conclusion of the District Court that there was no lack of substantial evidence to support the Commission's findings."

There can be no doubt but that the value to be given to the findings of the Interstate Commerce Commission on matters involving the justness or reasonableness of rates and as to whether a contested rate does or does not work prohibited discrimination, is well established. Those findings are not subject to review by the Court unless there has been error in the application of rules of law.

The decisions referred to above relate to hearings before the Interstate Commission when the matter under consideration is of prospective operation. The same principle applies in cases involving the payment of reparations, damages or overcharges. For instance, under the many decisions one can not have reparations against a common carrier for overcharges, or other like claims, in matters involving interstate transportation until the subject has been investigated by the Interstate Commerce Commission and the question of the un-

reasonableness of the rate charged or the unlawfulness of that rate shall have been ascertained by the Interstate Commission and the finding as to the unreasonableness or unjustness of the rate or the unjust discrimination worked thereby is final in the subsequent judicial proceedings thereon, unless there has been error in the application of the law.

Appellees must, of necessity, rely upon the thought that this value to be given to the findings of the Interstate Commerce Commission is to be put to one side when it comes to dealing with discrimination against interstate commerce worked by intrastate rates.

But the power of the Interstate Commerce Commission "is complete in itself" and "may be exercised to its utmost extent." Of course, the Commission can not exercise powers not granted to it by the Congress but there is no doubt about the power which the Commission undertook to exercise in this case having been granted to it by the Congress. Along with the power of making rates for the purpose of removing unjust discrimination comes the fact that the tariffs or schedules evidencing those rates were filed in the manner prescribed by law with the Interstate Commission and while thus filed, those were the only rates which might be used for the transportation service mentioned therein.

Why, therefore, should the value given to the findings of the Interstate Commerce Commission, as herein pointed out, not follow those findings through their entire course of application for any and all lawful purposes? Certainly, this value must be given to those findings in seeking adjustments between the persons who were parties to the proceedings in which the findings were made. If this be not true, the power

of the Commission however fully it may have been delegated by the Congress, lacks a great deal of having the completeness, the dominance and the extent contemplated by the decisions.

The opinion of this Court in *Board v. Great Northern Rwy.*, 281 U. S. at page 430 states:

> "Congress forbids the unjust discrimination through the fixing of intrastate rates but entrust the appropriate enforcement of its prohibition primarily to its administrative agency.
>
> "It is urged that the restraining power of the court is needed to prevent irreparable injury. But, in this class of cases, the question whether there is injury, *and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission.*" (Italics added.)

This language was evidently intended to assure the dominance and the completeness of the measures fixed by Congress in matters affecting interstate transportation.

The Evidence Which was Offered by the Appellees Did Not Have the Qualities Necessary to Undo the Commission's Findings in this Case.

The District Court's opinion, rendered on January 22, and filed on January 26, 1934 (Appendix No. 1 to Appellant's brief dated January 7, 1935), shows that the matter of the relation of the rates to the revenue of the carrier had little, if any, consideration. The question in this case was "that of the relation of rates to income." *Florida v. United States*, 282 U. S. 214. One can find nothing in the District Court's opinion

to suggest that that question has had any consideration by the Court. On the other hand the Court practically threw up its hands when it came to this element in the case and stated:

> "Discrimination as respects the revenues of the carrier, while a most important question in fixing permanent future rates, can hardly be investigated or considered in a private litigation between carrier and shipper regarding a past shipment." (See page 7, Appendix No. 1 to brief of January 7, 1935.)

IV. COUNSEL ARE ALSO REQUESTED TO POINT OUT WHAT DIFFERENCES, IF ANY, THERE ARE BETWEEN THE EVIDENCE BEFORE THE DISTRICT COURT AND THAT BEFORE THE INTERSTATE COMMERCE COMMISSION.

There is no Substantial Difference in the Evidence Before the Interstate Commerce Commission and that Before the District Court.

As a general statement (see Exhibit No. 1 hereto) the evidence before the District Court was in its scope as broad as that before the Interstate Commerce Commission in all of its hearings. The only difference is that the District Court had a greater mass of evidence, but none of the additional evidence was of such compelling probative value as to warrant the Master and the District Court to substitute their judgment for that of the Interstate Commerce Commission as expressed in its reports.

The claimants (appellees here), by their own statement, endeavored for the first time to prove before the Master the cost of the log transportation, having in their evidence before the Interstate Commerce Commission contented themselves primarily with tearing down the Atlantic Coast Line's evidence rather than introducing cost evidence of their own, except for their witness Pettijohn. They sought before the Master to prove in more detail the cost of transporting logs intrastate in Florida, using the witness, Henry J. Saunders, and his exhibits (R. Vol. II, p. 893, et seq.) (Exhibits pp. 74-97) in place of the witness, Fred Pettijohn (O. R. Vol. II, pp. 629, 644; Ex. 39-40; O. R. Vol. I, p. 369), who appeared before the Interstate Commerce Commission. We shall presently show that the evidence of Saunders was of little worth in this respect.

The record, report and first order of the Interstate Commerce Commission (146 I. C. C. 717) (O. R. pp. 16, 399, et seq.) were tendered in evidence before the Master by the Atlantic Coast Line. Likewise the reports and orders of the Interstate Commerce Commission in the two later hearings (186 I. C. C. 157; Exhibits p. 171, and 190 I. C. C. 588, Exhibits p. 157) were also offered before the Master by the Atlantic Coast Line. According to the record before this Court, the proceedings of the Interstate Commerce Commission were brought to the attention of the Master. (See Record Vol. I, p. 494, et seq., Vol. II, pp. 719, 982, et seq.)

Counsel for appellees stated:

> This case was "a supplement to and a part of the main proceeding and therefore I think everything in the main case is before Your Honor," the Master. (R. Vol. I, p. 494.)

The Master in his first report held (R. Vol. I, p. 90, et seq.):

"(11)

"The orders of the I. C. C., whether passed before or since the decision of the Supreme Court, are not admissible as evidence upon a hearing in this case before the Master, on the ground that they are irrelevant and immaterial. The same is true with reference to all of the findings and of all parts of the report of the I. C. C. including the evidence introduced before the Commission. These Orders, Findings and Report are treated as parts of the Record before the Court in the case, especially in view of the statements of counsel, to show the history and status of the case. None of them have been considered by the Master in determining whether or not the Cummer scale was unjust and unreasonable."

The District Court in its opinion and order of January 30, 1933, said (R. Vol. I, p. 172-3):

". . . To this end we recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly. The master may consider all evidence hitherto taken by him bearing upon the reasonableness of the charge to be made, and may receive such additional evidence as either party may desire to offer thereon."

In the second report of the Master, in discussing the evidence he said (R. Vol. I, p. 200):

"The reports and findings of the Commission relate to rates above referred to and constitute a part of the record of this case, or at least a part of the record out of which it grew. The Commission has had much experience in rate-making. In its reports it discussed and

criticized computations of some expert witnesses and stated computations and findings of its own. The Master thinks the reports should be considered in this investigation but nothing stated in them including its findings are binding on the Master in considering or deciding any of the questions or issues before him.

"The oral and documentary evidence in the record before the Interstate Commerce Commission, in many instances, is substantially the same as the evidence introduced in the hearings before the Master and in this report the Master will frequently refer to statements in the reports of the Commission, where such evidence is succinctly stated and readily accessible, instead of making reference to the evidence introduced at hearings before him."

The District Court in its opinion of January 26, 1934, said (R. Vol. I, p. 350, 353, 354):

"The original burden of proof was upon the claimants of restitution. When they showed what they had paid, and that it was in excess of the Cummer scale, the apparent state rate, the burden shifted to the Railroad Company, which assailed the Cummer scale and overturned it as an obligatory rate. Under the conditions of the rereference the burden then returned to the claimants to show what should in right and justice be restored to them, the case standing much as though they were suing in a court of law for overcharges. But the placing of the burden of proof is of no great practical importance because an abundance of evidence was offered by both sides, and the master's decision and our own goes on the evidence produced and not on the failure of either party to produce proof." (R. 350.)

"The testimony as to the cost of hauling the logs satisfies us that the master's findings of a reasonable charge affords compensation to the carrier. It may be

that trainloads might have been carried profitably at a less rate, but the traffic as a whole could not be carried for much less. Whether compensation should not be more liberal gives us the most concern. In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of *these very rates*, we should have inclined to think the rates which they fixed, first for interstate traffic and then for intrastate traffic on logs, ought to be accepted as the fair charge. Against this, however, is the thought that they were not dealing with past transactions but attempting to fix a future rate to which carriers and shippers ought to conform themselves, and the fact is strong that the low rates were voluntarily established and maintained over a long period by the carrier, and on the faith of them these claimants had made investments and established businesses which would be and were very disastrously affected by a sudden and drastic raising of rates. While the carrier was not bound to continue the low rates at a loss, and could demand compensatory rates, a just and reasonable regard to the entire situation makes against a sudden increase of more than one hundred per cent on a traffic in which freight costs are a large part of the value of the product shipped. If the ideal rates be those fixed by the Commission, the ideal might with reason and justice have been approached less precipitately. The just compensation as fixed by the master, applicable of course only to these past transactions, affords reimbursement for all fair elements of cost and a fair profit. His figure approximates the intrastate rates on logs in Georgia and North Carolina, and is some lower than that in Alabama and South Carolina. We think the master's conclusion is just and we affirm it." (R. 353-4.) (Italics added.)

The above quotations show that not only the parties to the litigation but also the Master considered that the evidence

before the District Court was substantially the same as that before the Interstate Commerce Commission. The issues in both proceedings were identical: (1) The issue of whether the Cummer scale was unjust, unreasonable and confiscatory was made before both tribunals and similarly disposed of; (2) The issue of whether this intrastate scale (Cummer scale) was a violation of Section 13(4) of the Interstate Commerce Act was before both tribunals and similarly disposed of; (3) The issue of what new scale should be adopted to cure these evils, before the Interstate Commerce Commission, to be used as a future rate, and before the District Court, to be used as a measure of restitution, was decided by both tribunals with this difference: The Interstate Commerce Commission adhered in every instance to its prescribed scale, which it held to be a minimum to accomplish this, while the Master and the District Court held that for the period under consideration (February 8, 1929, to April 10, 1931) only 83 per cent of the Interstate Commerce Commission's scale should be used as a measure of restitution, or, to express it differently, 66 per cent of the difference between the Cummer scale and the Interstate Commerce Commission scale.

Therefore, only on this third issue as to what would constitute a proper charge can it be said that there was a possible difference in the evidence. The claimants (appellees here) sought to prove this before the Master by rate or tariff comparisons in the same and other localities. Substantially all of these tariffs were testified to and exhibited to the Interstate Commerce Commission in the third hearing, considered (November, 1932, January, 1933) by the Commission and analyzed and their effect decided adversely to claimants in

the third report (190 I. C. C. 588) (Exhibits p. 157). This is stated by Perrin in his testimony (R. Vol. II, p. 1119-1200).

Claimants sought to expand and strengthen their cost evidence before the Interstate Commerce Commission, which was submitted by the witness, Fred Pettijohn, by substituting the witness, Henry J. Saunders, and his exhibits before the Master.

A short analysis shows that Saunders' testimony is based on incorrect assumptions and premises, and, while increasing the mass of the evidence before the Master, is not different in its probative value from the evidence before the Commission in their hearings.

Claimants (appellees here) seem to rely upon the fact that purely the cost of the movement was involved.

They rely to quite a degree upon the testimony of their witness Saunders. Saunders' testimony can be of no value whatever. *He at no time undertook to make a finding of cost based on the total expenses involved in these shipments.* At Record Vol. II, page 932, Mr. Saunders states:

"I did not make a finding on the total operating cost."

See also Record Vol. II, pp. 920, 930.

He undertook to make an estimate of the cost of handling the logs involved in this case on the basis of haulage expenses. This is illustrated by his exhibits Nos. 79a, 80a and 81a (Bound volume of exhibits pp. 86-95). In columns 2, 3 and 4 of his exhibit 79a he sets out the total freight operating expenses of the Atlantic Coast Line for 1929, 1930 and 1931, respectively. Then he takes what he terms a "weighted aver-

age"; that is, a certain part, calculated in percentages, of 1929, all of 1930, and part of 1931 (the restitution period when the rates prescribed by the I. C. C. were in effect, being from February 8, 1929, to April 10, 1931), and in column 6 gives the percentage of each item on exhibit 79a that he thinks is applicable to line haul expense. He then ascertains in column 7 the total system line haul expense and in column 8 the total Florida line haul expense.

In making these ascertainments he eliminates 36 accounts entirely; 64 accounts are only partially included (col. 6, Exhibit 79a) and out of 119 accounts only 19 are included in full. That is, under column 5 his "weighted average" operating expenses (freight) the total is $34,353,062. It must be borne in mind that this last named figure is one which Saunders has undertaken to ascertain and is not an actual figure. It is ascertained by using a fractional part of the expenses for 1929 and 1931 and all for 1930. (See exhibit 79a.) In column 7 of this exhibit Saunders states "the total System line haul expenses" at $20,432,664.

On the theory used by Saunders it was necessary for the Coast Line to pay out of its treasury $34,353,062 while he uses in ascertaining his line haul expenses $20,432,664. That leaves about $14,000,000 which it was necessary for the Coast Line to pay out in handling the freight service, wholly unaccounted for by Saunders in his evidence and in his exhibits. He did not at any time undertake to account for those eliminated amounts and accounts but emphatically stated time and again that he did not undertake to account for the total operating freight expenses for the period involved. He dealt only with what he called "line haul expenses." He did not account for all of these.

In solving the questions in this case the total operating expenses of hauling the logs involved must be accounted for. Plainly and clearly the appellees upon whom the burden rested did not make such an account, nor did they purport to do so.

In Saunders' Exhibit 80a he undertakes to show the basis of apportionment of line haul operating expenses for this appellant's system to the State of Florida. In his Column 8 of his Exhibit 79a he has apportioned $6,043,494 line haul expenses to Florida based on his fictitious "weighted average." Saunders' bases of distribution when considered appear to be unusual and wholly out of line with any bases of distribution known.

These Saunders' exhibits are discussed and criticized by appellants' witnesses Willoughby at R. Vol. II, p. 994, et seq. and Lamb at R. Vol. II, 1069, et seq. At Record page 1070 Mr. Lamb points out the errors in Saunders' exhibit 80a "which of course, destroy the figures shown in Column 8 of Exhibit 79a." Mr. Lamb then proceeds to show the basic errors in all Saunders' calculations.

In order to ascertain the actual cost as nearly as possible of the movement from Hines to Palatka—119 miles—(Lamb's Exhibit No. 12 before the Master on the first hearing, R. Vol. I, p. 604) the out-of-pocket expenses were found for one month. Those expenses which are known as out-of-pocket expenses consist of the following items:

Account No.		
392	Train Enginemen	$ 506.19
394	Fuel for train locomotives	1,138.49
397	Water for train locomotives	39.50

398	Lubricants for train locomotives.....	$ 8.27
399	Other supplies for train locomotives....	8.82
400	Enginehouse expenses—Train	19.05
401	Trainmen	562.86
402	Train supplies and expenses.....	115.37
	Total.....	$2,398.55

The relation of the aggregate of like items for the entire system to the freight haulage expenses for the system is then ascertained and the relation of the out-of-pocket expenses for the system to the entire operating expenses for the system is ascertained. In applying these percentages to ascertain the cost of the 119-mile haul from Hines to Palatka Mr. Lamb obtained two results: one of them took into account the entire operating expenses and the other took into account only so much of those operating expenses which were deemed to be appropriate for the hauling of logs.

Mr. Saunders undertook to attack this calculation by Lamb by making a substantial reduction in the amount paid to enginemen—the first item in the above stated out-of-pocket expenses; he also made a reduction in the trainmen account (No. 401) and in the fuel for train locomotives account (No. 394 above). In making the reductions in the amounts paid to enginemen and trainmen Mr. Saunders based his figures on clock hours; that is, on the number of hours it took to perform the service in question. The time, in actual practice (which Mr. Lamb used) is not calculated on that basis. The enginemen and trainmen are paid upon a constructive mileage based on the class of the train, as well as on the time consumed. For instance, Mr. Saunders figures the time on the Hines to Palatka movement at 8 hours. The actual time paid

for was 9 hours and 31 minutes. Mr. Saunders also disregarded the actual tonnage of coal used in the engines. Lamb had used the amount paid covering the actual tons charged to the engine in the particular service.

Saunders undertook to correct Lamb's statement of out-of-pocket expenses (upon which are based a number of the exhibits calculating the cost of various movements) and reduced them from $2,398.55 to $1,661.36 when correction of the three items referred to was made according to Saunders' calculation of those items; that is, amounts paid to train enginemen, trainmen and amount of fuel for train locomotives. When corrected only as to the item of fuel Mr. Saunders' figure for out-of-pocket expenses was $2,166.38.

Each of Saunders' corrections of Lamb's statement of out-of-pocket expenses was erroneous. The amount of salaries was specifically ascertainable and the error therein is perfectly plain. The correction in the amount for fuel involved some dispute or debate. (See Lamb's evidence beginning at R. Vol. II, p. 1053.)

Beyond any doubt Saunders' testimony and exhibits based on the fact that he did not at any time purport to use all the operating expenses involved, and his calculation of the relation of out-of-pocket expenses to the entire expenses, were plainly and distinctly erroneous. His erroneous figures being used as bases for percentages on the various exhibits made the results erroneous in large amounts.

Each one of Saunders' exhibits is discussed by the witness Lamb beginning at R. Vol. II, page 1052.

The extremely technical evidence, to which reference has been made, should have been considered by the Interstate Commerce Commission—the body of experts set apart for that purpose. No other Governmental agency, including the Courts, had jurisdiction so to do.

The Master made determinations in precise conflict with those made by the Interstate Commerce Commission.

Uniformity is utterly impossible under the plan followed in this case. The divergence between the Court and the Commission was of that nature which this Court has sought to make impossible by the case to which we have referred in this brief.

CONCLUSION

We respectfully submit that the first question raised by the Court should be answered in the negative.

The answer to the second question, assuming the District Court had jurisdiction, should be that the measure of restitution in a case of this character relating to the revenue needs of the carrier is a proper rate or charge which reflects all proper and lawful elements, and certainly that element of unjust discrimination found to exist.

The answer to the third question, again assuming jurisdiction to be in the District Court, should be that the record, findings, reports and orders of the Interstate Commerce Commission are conclusive on a court in such an inquiry where substantially the same evidence, covering the same period of time, is before both tribunals.

The appeal of the Atlantic Coast Line Railroad Company should be sustained because no court, Federal or State, has power to substitute its judgment for that of the Interstate Commerce Commission in a case such as the one at bar. The action of the District Court should be reversed with direction to dismiss each of the motions for restitution, for that no one of them presents any question which, in the circumstances of the case at bar, is judicable in any court.

Respectfully submitted,

CARL H. DAVIS,

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WM. HART SIBLEY,

Attorneys for Atlantic Coast Line Railroad Company.

March 4, 1935.

Exhibit No. 1

Summary of Proceedings

BEFORE THE INTERSTATE COMMERCE COMMISSION

First hearing before I. C. C.—Docket No. 18364.

Began October 20, 1926.

Order (146 I. C. C. 717) decided August 2, 1928; *Fla. v. U. S.*, 282 U. S. 194.

Second hearing

I. C. C. reopened Docket No. 18364 April 6, 1931.

Hearings were held June 10 to 12, 1931; July 20-21, 1931; February 3, 1932.

Order (186 I. C. C. 157) decided July 5, 1932.

Third hearing

I. C. C. reopened Docket No. 18364 October 21, 1932.

Hearings held November 21 to 23, 1932.

Order (190 I. C. C. 588) decided January 9, 1933. *Fla. v. U. S.*, 292 U. S. 1.

BEFORE THE DISTRICT COURT

Mandates lodged in the Court February 19, 1931.

Order making mandates judgment of the Court March 7, 1931.

Order allowing restitution and reference to the Master, July 31, 1931.

Hearing before the Master January 29-30, 1932.

Opinion of Court and Order of Reference, March 18, 1932.

Hearings on rereference May 9 to 11, 1932; May 30-31, 1932; September 26-27, 1932.

First report of Master November 14, 1932.

Second order of rereference January 20, 1933.

Hearings on rereference March 27, 1933; April 7, 1933; May 11 to 13, 1933; July 6, 7, 8, 10, 11, 21, 22, 1933.

Second report of Master November 7, 1933.

Final decree of District Court April 17, 1934.

Before the Interstate Commerce Commission

From the transcript of the Records it will be seen that in the three hearings before the Interstate Commerce Commission there appeared for the Atlantic Coast Line and the Georgia interests 24 witnesses, who introduced 102 exhibits. This evidence may be grouped as follows:

[O.R. Vol. II, p. 401, et seq.
O.R. Vol. I, p. 233, et seq.
See also O.R.* (1)*, p. 621, et seq.]*

1. Tariff and rate comparisons and explanations.	Price, Abrams, Potter, Chancellor, Streyer, Perrin, Gill, Norden, M. W. Thomas, C. D. Thomas, Miles. Exhibits No. 1, 46-53; 2, 3-8; 9, 10-24, 54-77, 124-130, 149, 150-154, 155, 156, 157-161.
2. Sawmill Operators and logging conditions.	J. C. Jackson, Simmons, Giddings, Davis, H. W. Jackson.
3. Tariff conditions	Hansell, White. Exhibit No. 25.
4. Cost, revenue, valuation evidence	Lamb, Langley. Exhibits Nos. 78-99, 131-133.

*"O.R. (1)" is the record before the Supreme Court in Docket No. 342 October Term, 1933, reported 292 U. S. 1. Therefore, for a full list of witnesses and their exhibits reference must be made to the records in 282 U. S. 194 and 292 U. S. 1 and the present record.

BEFORE THE DISTRICT COURT

In all hearings before the Master the Atlantic Coast Line (defendant) put up 20 witnesses, 3 of which appeared in one or more of the Interstate Commerce Commission hearings (Perrin, Lamb and Langley). These witnesses introduced 159 exhibits. This evidence may be grouped generally as follows: (R. Vol. I, p. 485 et seq.—Exhibits).

1. Formal or foundation evidence	McCaig, Warren, Dewey, Gholson, Oldenbuttel, Merritt, Ingram, Ledbetter. Ex. Alston No. 1-15, Warren No. 1-18, Ingram No. 1, A. C. L. No. 1-13, 1 B-3 B.
2. Tariff and rate comparisons and explanations	Perrin, Pope, Sheppard, Ware, Drescher. Exhibits No. 10B-73-B, 76B, 77B, 4B.
3. Traffic conditions; volume of business	Evidence of this character was contained in the testimony of several witnesses, whose main testimony is listed herein.
4. Cost, revenue, valuation evidence	Willoughby, Lamb, P. S. Smith, Aspinwall, Langley, Ledbetter, Sibley, Brown. Exhibits No. 9B, 74B, 75B, 5B-7B, 8B.

Before the Interstate Commerce Commission

Intervenors (claimants) and the Florida interests put up 29 witnesses who introduced 61 exhibits in the Interstate Commerce Commission hearings. This evidence may be grouped generally as follows (O.R. Vol. II, p. 401, et seq., O.R. (1), Vol. I, p. 621, et seq.):

1. Tariff and rate comparisons and explanations	Greene Exhibits No. 45, 134-140A.
2. Sawmill operators and logging conditions.	Cummer, Wilson, Fleishel, Reeves, Goethe, Foley, Scherer, Crockett, McCain, Scanlon, McPherson, Bryson. Exhibits No. 26-30, 31, 32, 33-35, 36-38, 41-43, 44.
3. Tariff conditions	Keen, True, Wells, Flack, Shore, Buffam, Rowland. Exhibits No. 30, 100-110, 111-123, 141, 142, 145, 162.
4. Cost or revenue	Baptiste, Pettijohn. Exhibits No. 39-40.
5. General exhibits, maps, etc.	Exhibits No. 146-148, 163.

BEFORE THE DISTRICT COURT

Claimants (intervenors before the Interstate Commerce Commission) put up 18 witnesses, 10 of which appeared in one or more of the Interstate Commerce Commission hearings (True, Fleishel, McPherson, E. C. Greene, Baptiste, Scherer, Foley, Cummer, Rowland, Flack) and these witnesses introduced 129 exhibits. This evidence may be grouped as follows (R. Vol. I, p. 485, et seq.—Exhibits):

1. Formal or foundation evidence	Thompson, Greene, Myers, Ashby. Ex. Adair No. 1-13, Norman No. 1, Turnbull No. 1, No. 1-4, 7, 8, 95A-97A.
2. Tariff and rate comparisons and explanations	True, Greene. Exhibits No. 5, 6, 1A-30A, 31A-42A, 48A, No. 52A-69A, 86-92A, 93A, 94A.
3. Traffic conditions; volume of commodity	Fleishel, Lloyd, Foley, Cummer, Rowland, Effinger, Flack. Exhibits No. 43A, 104A-104A(11).
4. Cost revenue valuation evidence	McPherson, Baptiste, Scherer, Saunders, Roux. Exhibits No. 44A-47A, 100A, 101A, 49A-51A, 70A-85A, 105A, 98A, 99A, 99A(1), 106A, 102A.